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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 434

SIDNEY W. WILSON, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

REPLY TO BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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TABLE OF AUTHORITIES

CASES: Page

Alaska Airlines, Inc., 13 CAB 495 4
Aviation Corporation of Seattle, 13 CAB 526 5
Bethell, Francis C., 13 CAB 28 4
Brown v. Civil Aeronautics Authority, 112 F. 2d 737, op. supp. 119 F. 2d 172 (C. A. 9) 5
Brubaker and Olsen, CAB Dockets SR-2168, 2169 .. 3
Fong Haw Tan v. Phelan, 333 U.S. 6 4
Hard v. Civil Aeronautics Board, F.2d (C. A. 7) 6
Helvering v. Mitchell, 303 U.S. 391 4
L. P. Steuart & Bro. v. Bowles, 322 U.S. 398 4
Law, George, 13 CAB 495 4
Line, Henry, 13 CAB 308 4
Neal, Jack N., CAB Dkt. SR3-1563 4
Reiss, Malcolm, 13 CAB 300 4
United Air Lines v. Civil Aeronautics Board, 198 F. (2d) 100 (C.A. 7) 5
U. S. ex rel. Accardi v. Shaughnessy, 347 U.S. 26 .. 6
U.S. v. E. I. Dupont de Nemours & Co., 353 U.S. 586, 590 2
Wallace v. Cutten, 298 U.S. 229 4

STATUTES:

Section 2, Civ. Aero. Act of 1938, 49 U.S.C. Sec. 402, 52 Stat. 980 1
Section 3, Civ. Aero. Act of 1938, 49 U.S.C. Sec. 403, 52 Stat. 980 2
Section 609, Civ. Aero. Act of 1938, 49 U.S.C. Sec. 559, 52 Stat. 1011 4
Section 702, Civ. Aero. Act of 1938, 49 U.S.C. Sec. 582, 52 Stat. 1013 6
Section 901, Civ. Aero. Act of 1938, 49 U.S.C. Sec. 621, 52 Stat. 1015 5
Section 903, Civ. Aero. Act of 1938, 49 U.S.C. Sec. 623, 52 Stat. 1017 5
Section 1004 (i), Civ. Aero. Act of 1938, 49 U.S.C. Sec. 644 (i), 52 Stat. 1021 2

REGULATION:

Civil Air Regulation, Sec. 21.24, 14 C.F.R. 21.24 5

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In view of several assertions contained in the argument of respondent, counsel for petitioner have deemed it appropriate to file this reply brief in an effort to be of assistance to the Court in determining whether the writ of certiorari should be granted herein.

On pages 7-8 of the Brief in Opposition, respondent makes considerable point of the Congressional declaration of policy in Section 2 of the Civil Aeronautics Act of 1938 to the effect that the Board shall consider as being "in the public interest" the regulation of air transportation in such manner as to "assure the highest degree of safety."

While not denying that the respondent does indeed have the duty described, the Court's attention is respectfully directed to the declaration of Congress in Section 3 of the Act whereby the rights of individuals in aviation are likewise fully recognized by Congress. Section 3 provides:

> "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States." (Sec. 3, 49 U.S.C. 403).

Surely this declaration is equally cogent in determining the scope of the Board's powers under the "public interest" criterion.

Contrary to the assertion on page 9 of respondent's brief, petitioner strongly challenges the submitted figure of approximately 4,000 cases upon which respondent relies to show a consistent practice of imposing suspension penalties for violations. As previously stated, we read *United States* v. *E. I. Dupont de Nemours & Co.*, 353 U.S. 586, 590, as holding that administrative practice would be more persuasive as to the intention of Congress had there first been an actual contest and decision of the disputed issue by the regulatory agency. In August, 1954, the respondent Board decided that the immunity section of the Act (Sec. 1004(i)) was applicable in cases where the complaint alleged that the pilot should be suspended because he had violated Civil Air Regulations under circumstances[1] endangering lives and property. Before the

[1] The circumstances involved a mid-air collision between a United airliner and an American airliner over Michigan City, Indiana.

Board reached the conclusion that the immunity section would apply to such actions it was essential, of course, to determine whether the complaint stated a remedial or penal cause of action. The Board stated therein:

> *"No case precisely in point has been brought to our attention,* and support exists for both the views of the pilots (that such suspension is punitive) and the Administrator (that such suspension is remedial)." (Italics supplied). *Brubaker* and *Olsen*, CAB Dockets, SR-2168, 2169.

The Board not only found that the complaint was penal in character but offered to permit the Administrator of Civil Aeronautics on remand to amend the complaint if the Administrator considered remedial action proper, an offer that was never accepted. It is not denied that this was the very first time that the Board was squarely confronted with and decided this issue. The case herein followed shortly thereafter. Accordingly, the argument and authorities cited on pages 13-15 of the petition demonstrate the fallacy of any contention that weight should be accorded to the so-called administrative construction.

In discussing *Brubaker* and *Olsen*, respondent states that suspensions imposed to deter violators are "remedial in the sense that they are designed to promote safety." (Resp. Br. 12). They have failed to state, however, why this is so, and it must be quite clear by now that it can only be the so-called "deterrent effect" of such sanctions that have this design. As we earlier suggested (Pet. 16-17) such effect, if it exists at all, is at least equally present in judicial proceedings to assert a penalty. This is a procedure which avoids the unanswered question of how a penalty suspension of

a qualified pilot's license can be in the interest of the public and in the furtherance of the highest degree of safety when it, in fact, will only make him less qualified—at least temporarily.

Moreover, our understanding of the decision in *L. P. Steuart & Bro.* v. *Bowles*, 322 U.S. 398, is that the courts will not imply the power to issue a punitive suspension unless the statute expressly authorizes such power, but they will uphold orders of suspension if there is a specific finding that such orders are remedial. Respondent has made no such finding. We further submit that the holding in *Steuart* renders academic the footnote remarks of Mr. Justice Brandeis in *Helvering* v. *Mitchell*, 303 U.S. 391, 400, footnotes 2 and 3. Cf. *Wallace* v. *Cutten*, 298 U.S. 229 and *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10.

On page 10 of respondent's brief, it is stated that "the petitioner does not squarely face the question necessarily raised by this contention, namely, the circumstances under which a suspension would be purely remedial". Respondent knows full well the circumstances under which a suspension is purely remedial for in many cases decided by respondent, it has exercised its true remedial powers, without attempting to punish under Section 609, where the facts demonstrated incompetency or lack of flying efficiency. In such cases, the Board has suspended the certificate until such time as the holder has completed additional flight instruction, corrected specified deficiencies, and retaken flight tests and written examinations. See for example, *Francis C. Bethell*, 13 CAB 28; *George Law*, 13 CAB 263; *Malcolm Riess*, 13 CAB 300; *Henry Line*, 13 CAB 308; *Jack N. Neal*, Dkt. No. SR3-1563 (September 10, 1956); *Alaska Airlines, Inc.*, 13 CAB

495; *Aviation Corporation of Seattle*, 13 CAB 526; Cf. *Brown* v. *Civil Aeronautics Authority*, 112 F. (2d) 737, op. supp. 119 F. (2d) 172 (C.A. 9).

There certainly seems to be no merit in respondent's reliance on the two different standards set forth in Section 609 for suspension and revocation.* Clearly, revocation is an action of greater magnitude and due process would require a more exacting standard than the lesser temporary suspension action which might obtain at times in order to correct a deficiency not justifying revocation. In either event, it has not been made clear why the power to penalize should be implied from this Section when read in its entirety. Respondent would have this Court believe that the phrase "the interest of the public" implies the power to punish. We submit this is contrary to established principles of statutory construction as it renders superfluous the elaborate penalty provisions contained in Sections 901 and 903. In addition to the points previously made in this regard (Pet. 15-17), the Court's attention is respectfully invited to the case of *United Air Lines* v. *Civil Aeronautics Board*, 198 F. (2d) 100 (C.A. 7) where the court, in discussing the powers granted in another but similarly worded section of the Act, stated:

> "It will be noted that the power given to the Board to alter, amend, modify or suspend existing certificates is *not punitive in character*, but depends for its exercise upon the requirements of public convenience and necessity, which are the same standards under which the Board may grant certificate rights under Sec. 401(d) of the Act." (Italics supplied)

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* It is questionable whether the Board in issuing sanctions had ever considered such distinction. See Civil Air Regulation 21.24, Pet. p. 5a.

Finally, counsel wish to advise the Court that the case of *Hard* v. *Civil Aeronautics Board,* . F. (2d) , stated on page 18 of the petition to be then pending in the United States Court of Appeals for the Seventh Circuit, has now been decided by that Court. The decision in the *Hard* case is adverse to the petitioner. Counsel have been advised, however, that the petitioner in the *Hard* case contemplates filing in this Court his petition for writ of certiorari. The Court is further advised that, while the *Hard* case involves the precise question of statutory power raised herein, it also involves a constitutional issue on the question of prejudgment related to that involved in *U. S. ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 26.

It is desired to point out the status of the *Hard* case to this Court in order to demonstrate the general importance of the question involved herein as well as to indicate the probability that this Court will be asked to decide the constitutional issue of prejudgment by respondent arising in the exercise of its powers in Section 702, 49 U.S.C. 582.

For the reasons stated herein and in the petition, it is respectfully submitted that the writ of certiorari should be granted in this case of first impression.

Respectfully submitted,

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